

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

FRIDAY, THE 29TH JUNE 2007 / 8TH ASHADHA 1929

CMA.No. 292 of 2001()

**AS.210/1994 of II ADDL. DISTRICT COURT, PALAKKAD
OS.55/1989 of SUB COURT, OTTAPPALAM**

APPELLANT - IST RESPONDENT - PLAINTIFF:

**T.K. BALAN, S/O. THARUVARAKKALLOTTIL RAMAN
@ APPUKUTTA GUPTHAN, SHANTHIKKAL HOUSE,
KARAKURUSI AMOMS, PALLIKURUP DESOM,
MANNARKKAD TALUK, PALAKKAD DISTRICT.**

**BY ADV. SRI.A.P.CHANDRASEKHARAN
SMT.PRABHA R.MENON
SRI.PUSHPARAJAN KODOTH
SRI.M.KRISHNAKUMAR
SRI.K.JAYESH MOHANKUMAR**

RESPONDENTS - APPELLANT - RESPONDENT - DEFENDANT:

- 1. UNNIKRISHNAN, S/O. LATE KUNJUNNI GUPTHAN,
MELUKUNNATHKALAM, KARAKURUSI AMSOM,
MANNARKKAD TALUK, PALAKKAD DISTRICT.**
- 2. KUTTAN, S/O. LATE THEKKANANGADI UNNI MOOTHAN,
THEKKANANGADI HOUSE, KADAMPAZHIPPURAM POST,
OTTAPALAM TALUK, PALAKKAD DISTRICT.**
- 3. APPUKUTTY, S/O. DO. DO. DO.**
- 4. RAMAKRISHNAN, S/O. DO. DO. DO.**
- 5. KUNJUMALU AMMA, W/O. LATE THARUVARAKKALLOTTIL
KUNJU MOOTHAN, MELEKUNNATHKALAM, KARAKURUSI
AMSOM, MANNARKKAD TALUK, PALAKKAD DISTRICT. (DIED)**
- 6. SARASWATHY, W/O. LATE VIDHYANANDHAN, KARAKURUSI
AMSOM, MANNARKKAD TALUK, PALAKKAD DISTRICT.**

ADDITIONAL RESPONDENTS IMPEADED:

7. **JANARDHANAN, S/O. LATE KUNJUMALU AMMA,
MELEKUNNATHKALAM, KARAKURUSSEI AMSOM,
MANNARKKAD TALUK, PALAKKAD DISTRICT.**
8. **VIJAYALAKSHMI, D/O. LATE KUNJUMALU AMMA, DO. DO.**

**ADDITIONAL RESPONDENTS 7 AND 8 ARE IMPEADED
AS THE LEGAL HEIRS OF DECEASED 5TH RESPONDENT
VIDE ORDER DATED 7.6.3005 IN I.A. NO.233 OF 2003.**

**BY ADV. SRI.S.V.BALAKRISHNA IYER
SRI.P.B.KRISHNAN
SRI.P.G.PARAMESWARA PANICKER
SRI.SANTHEEP ANKARATH
SRI.M.K.SREEGESH**

**THIS CIVIL MISC. APPEAL HAVING BEEN FINALLY HEARD
ON 29/06/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

K. PADMANABHAN NAIR, J.

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C.M.A. NO. 292 OF 2001

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Dated this the 29th day of June, 2007

J U D G M E N T

Plaintiff in O.S. No. 55 of 1989 on the file of the Sub Court, Ottapalam, a suit for recovery of possession, is the appellant in this appeal. Appellant is challenging the judgment of remand passed by the lower appellate court by which it set aside the decree and judgment to a limited extent and remanded the case for consideration of an additional plea raised by the defendants, in this appeal.

2. Plaintiff filed the suit for recovery on the strength of title. Defendants raised a contention that the plaintiff's claim for recovery is barred by res judicata on account of the decisions rendered in O.S. No.41 of 1955, Munsiff's Court, Perinthalmanna and O.S. No.92 of 1983, Munsiff-Magistrate Court, Mannarkad. It was also contended that plaintiff has no title and possession and defendants are owners of the property.

3. Trial court raised as many as 5 issues. The 4th issue raised in the suit was whether the suit was barred by

adverse possession and limitation? Trial court found that no specific plea of adverse possession was raised by the defendants in the written statement. Relying on a decision reported in *Abubaker v. Union of India* (1972 KLT 74) trial court took a view that evidence cannot be looked into in the absence of pleadings. Since there was no pleadings, trial court did not enter into any discussion regarding the question of adverse possession and limitation. Suit was decreed. Challenging the decree passed by the trial court, 6th defendant filed A.S. No.210 of 1994 before the District Court, Palakkad. In the appeal he filed I.A. No.1414 of 1996 for permitting him to file an additional written statement. Lower appellate court confirmed the findings of the trial court regarding the plea of res judicata as well as the title raised by the plaintiff. It was found that the claim of the plaintiff to recover the suit property on the strength of title is not barred by res judicata. It was also found that the plaintiff is having title over suit property. But the lower appellate court considered the petition for admitting additional written statement and held that it is only just and proper to receive the additional written statement. The lower appellate court received the additional written statement. Since the trial court did not consider the

issue regarding adverse possession and limitation as there was no pleadings for the same, the case was remanded for considering that issue alone. Challenging that order of remand, this appeal is filed.

4. No substantial question of law was framed in the appeal at the time of admission. Learned counsel for the appellant while arguing the matter submitted that the following substantial questions of law arise for consideration.

(1) Whether the order of remand by the lower appellate court is legal and proper? and

(2) Whether the defendant who sets up a title in himself can contend that the title of the plaintiff is lost by adverse possession and limitation?

5. Suit was one for recovery of the property on the strength of title. Evidence on record shows that fight started from the year 1955 onwards. Parties are close relations also. Plaintiff made two unsuccessful attempts to get the property. Hence he filed the present suit. In fact the trial court also raised an issue as to whether the title of the plaintiff is lost by adverse possession and limitation. On the ground that there was no pleadings, that issue was not considered. Before the lower appellate court the appellant/sixth defendant

filed I.A. No.1414 of 1996 for allowing him to file additional written statement and filed the same. Lower appellate court gave very valid and cogent reasons for accepting the additional written statement. Since the issue was not considered by the trial court, the matter was remanded for consideration of that issue alone.

6. Learned counsel for the appellant relying on the decision reported in V. Rajeshwari (Smt.) v. T.C. Saravanabava (2004 (1) SCC 551) has argued that even if the entire case pleaded in the additional written statement is accepted as such, defendants are not entitled to raise a contention on adverse possession. It is argued that when the 6th defendant sets up a title in himself, he cannot be allowed to turn round and argue that plaintiff's title is lost by adverse possession and limitation. Learned counsel for the respondents, on the other hand, argued that a defendant has got a privilege of raising inconsistent pleas in the written statement and merely because the defendant has raised one plea which is inconsistent with another plea raised in the written statement, his case cannot be rejected. I am of the view that whether a defendant can raise inconsistent pleas in

the written statement is also a matter to be considered by the trial court. Reasons stated by the lower appellate court for accepting the additional written statement cannot be held to be illegal or perverse. There is no scope for interfering with the remand order. So this appeal is only to be dismissed. This being a suit of 1989, it is only just and proper that the trial court shall give top priority to the suit and dispose of the suit within three months from the date of appearance of the parties before it. I make it clear that I have not considered any of the contentions raised by the parties on merits and are left open to be decided by the trial court.

7. In the result, appeal is dismissed.

8. Parties are directed to appear before the Sub Court, Ottapalam on 30.7.2007.

Petition Nos.5031 of 2001, 4892 of 2002, 222 and 2466 of 2003 will stand dismissed.

K. PADMANABHAN NAIR, JUDGE.

K. PADMANABHAN NAIR, J.

C.M.A.NO. 292 OF 2001

J U D G M E N T

29TH JUNE, 2007